UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MANOR CARE OF YEADON PA, LLC,	)	
	)	
Employer,	)	
	)	
	)	
and	)	**Case Nos. 04-RC-196504**
	)	**04-RC-197201**
	)	
	)	
SEIU HEALTHCARE PENNSYLVANIA,	)	
	)	
Petitioner.	)	
	)	

EMPLOYER'S REQUEST FOR REVIEW

NOW COMES the Employer, ManorCare of Yeadon PA, LLC ("ManorCare"), by and through its attorneys, and files the following Request for Review of the following:

1. The Decision and Direction of Election ("D and D") in Case 04-RC-196504 (the "LPN Supervisor Case"), issued by the Acting Regional Director, Region 4, on May 25, 2017;

2. The Decision and Direction of Election in Case 04-RC-197201 (the "CNA" Case), issued by the Acting Regional Director, Region 4, on May 25, 2017; and

3. The Decision and Certification of Representative ("D and C") overruling the Employer's Exceptions to the Report on Objections and Direction of Election in the consolidated cases ("the Consolidated Cases"), issued by the Regional Director of Region 22, on November 13, 2018. [1]

[1] Citations to the Appendix are designated by abbreviation "Appx." with letter. References to the transcript and/or exhibits in each case are designated by case abbreviation and "Tr." followed by the page number or exhibit abbreviation "The Appendix filed herewith includes copies of the cited documents.

This Request for Review is based on the following:

1. The Decisions are clearly erroneous on a substantial factual issue and such error prejudicially affects the rights of the Employer;

2. The Decisions raise significant questions of law and policy both because of the absence of, and departure from, reported Board law; and

3. To the extent that the Decisions do correctly reflect Board law, they present compelling reasons for reconsideration of rules which have, in application, prejudicially affected the rights of the Employer.

I. STATEMENT OF THE CASES[2]

A. Case 04-RC-196504 – the "LPN Supervisor Case"

Petitioner SEIU Healthcare Pennsylvania filed a petition to represent Licensed Practical Nurse Supervisors (LPNs) at ManorCare's Yeadon, Pennsylvania facility. Region 4 of the National Labor Relations Board processed the petition pursuant to the new R Case Regulations, as well as the principles of the Board's then-applicable *Specialty Healthcare* decision governing unit appropriateness. In its Statement of Position to Region 4, the Employer objected to the application of the Regulations, as well as the validity of the Regulations themselves. (Appx. B). With respect to unit appropriateness, the Employer objected on the grounds that the proposed unit was contrary to the rules relating to the extent of organizing, as well as prohibitions against the proliferation of units. Finally, the Employer objected to the unit on the grounds that the individuals sought to be represented were Section 2(11) supervisors, making the unit inappropriate as a matter of law.

[2] According to the case dockets, both Representation cases are currently blocked. (Appx. A). This is apparently the result of one or more unfair labor practice charges that Petitioner filed against the Employer, one of which is still pending before the General Counsel following the Union's appeal of Region 4's dismissal of the charge.

A hearing regarding these issues was held before a Hearing Officer for Region 4 on April 19 and 20, 2017. At the hearing, the Hearing Officer limited the Employer in the presentation of its arguments, rejecting several of the objections contained in the Employer's Statement of Position, and restricting the scope of the hearing to the issue of supervisor status. Specifically, on stated prior advice from the Acting Regional Director, the Hearing Officer refused to consider the Employer's motion to transfer the case to another Region and the Employer's evidence in support thereof; on this same basis, the Hearing Officer further refused to consider the Employer's evidence or arguments that the Regulations were invalid as applied, or its argument regarding to the proliferation of units caused by application of the *Specialty Healthcare* rule. (Appx. C at 11-12). Accordingly, the hearing proceeded with the Hearing Officer allowing evidence on, and considering only, the issue of supervisor status. (Appx. C at 11-12).

On August 25, 2016, the Acting Regional Director of Region 4 issued an amended Decision and Direction of Election finding that the LPN Supervisors were not Section 2(11) supervisors, and concluding that the R Case Regulations were valid on their face. He further denied the Employer's request for transfer as being necessary. (Appx. W).

The Employer now makes this request for review of this Decision and Direction of Election on four grounds:

1. The uncontroverted evidence at the Hearing demonstrated that the Yeadon LPN Supervisors were Section 2(11) supervisors, and the Acting Regional Director's contrary conclusion was erroneous as a matter of law;

2. The Regulations are invalid on their face, and their application in this case violated the National Labor Relations Act, as well as the Due Process clause of the U.S. Constitution;

3. The Hearing Officer erred in refusing to hear evidence relating to the Employer's Motion to transfer the case to another Region, and the Acting Regional Director erred in denying that Motion; and

4. The hearing was conducted pursuant to the Board's erroneous *Specialty Healthcare* decision, and the Employer was entitled, as a matter of fairness and due process, to have the proceeding reopened after the Board vacated *Specialty Healthcare,* and the NLRB Office of the General Counsel, in General Counsel Memorandum OM 18-05 (December 22, 2017) ordered all Regions to allow parties in such cases the opportunity to show cause why the unit hearings should be reopened. (Appx. FF). If the *Specialty Healthcare* rule had not been in force at the time of the hearing, the Employer would have been free to show that, under the traditional community of interest standard of *PCC Structurals,* a single wall-to-wall combined unit would have been appropriate if the LPN Supervisors were deemed "employees" under the Act.

B. Case 04-RC-197201 – the "CNAs Case"

Petitioner SEIU Healthcare Pennsylvania filed a petition to represent Certified Nurse Assistants ("CNAs") and other workers at the Employer's Yeadon, Pennsylvania facility. Region 4 processed the petition pursuant to the new R Case Regulations and in accordance with the Board's then-applicable *Specialty Healthcare* standard governing unit appropriateness. Here, again, the Employer filed a Statement of Position with Region 4, in which it objected to both the Regulations and the application of the Regulations, and to the proposed bargaining unit on the grounds that the unit represented the extent of union organizing, and would create a proliferation of units. (Appx. X).

A hearing regarding these issues was held before a Hearing Officer for Region 4 on April 28, 2017. At the hearing, the Hearing Officer limited the Employer in the presentation of its arguments, rejecting several of the objections contained in the Employer's Statement of Position, and restricting the scope of the hearing to arguments regarding the inclusion or exclusion of certain employees in the unit. Specifically, on stated prior advice from the Acting Regional Director, the Hearing Officer refused to consider the Employer's motion to transfer the case to another Region and the Employer's evidence in support thereof; on this same basis, the Hearing Officer further refused to consider the Employer's evidence or arguments that the Regulations were invalid as applied, or its argument regarding to the proliferation of units caused by application of the

Specialty Healthcare rule. Accordingly, the hearing proceeded with the Hearing Officer allowing evidence on, and considering only, the inclusion and exclusion issues. (Appx Z at 8-12).

On May 25, 2017, the Acting Regional Director of Region 4 issued an amended Decision and Direction of Election, concluding that the R Case Regulations were valid on their face. He further denied the Employer's request for transfer as being necessary. Finally, he concluded that, pursuant to *Specialty Healthcare,* the appropriate unit should include only CNAs and Recreation Assistants. (Appx. AA). The Employer now makes this Request for Review of this Decision and Direction of Election on three grounds:

1. The Regulations are invalid on their face, and their application in this case violated the National Labor Relations Act, as well as the Due Process clause of the U.S. Constitution;

2. The Hearing Officer erred in refusing to hear evidence relating to the Employer's motion to transfer the case to another Region, and the Acting Regional Director erred in denying that Motion;

3. The hearing was conducted pursuant to the Board's erroneous *Specialty Healthcare* decision, and the Employer was entitled, as a matter of fairness and due process, to have the proceeding reopened after the Board vacated *Specialty Healthcare,* and the NLRB Office of the General Counsel, in General Counsel Memorandum OM 18-05 (December 22, 2017) ordered all Regions to allow parties in such cases the opportunity to show cause why the unit hearings should be reopened. If the *Specialty Healthcare* rule had not been in force at the time of the hearing, the Employer would have been free to show that under the traditional community of interest standard of *PCC Structurals,* a single wall-to-wall combined unit would have been appropriate if the LPN Supervisors were deemed "employees" under the Act. (*See* Appx. FF).

C. The Consolidated Objections Proceedings

After the elections, both cases were belatedly transferred to Region 22 and consolidated for further processing. (Appx. BB). Region 22 Hearing Officer Marilu Arent was presented with the Employer's Objections in both cases. In her resulting Report, she recommended overruling all the Objections, and certifying the Petitioner in each case. (Appx. EE).

The Employer filed Exceptions to many of her findings as being contrary to the facts and well-established law. On November 13, 2018, Regional Director David E. Leach III, Regional Director of Region 22, issued a Decision and Certification of Election in which he overruled all the Employer's Exceptions and Objections. The Employer now makes this Request for Review of the Regional Director's November 13 Decision and Certification on the following grounds:

1. The Board's R Case Regulations are invalid on their face and as applied here; moreover, the Regulations as applied by the Acting Regional Director of Region 4 precluded the Employer from submitting evidence on this issue;

2. The Regional Director, Region 22 erroneously found that the Petitioner's service of multiple illegal subpoenas to a large number of Yeadon employees was not *per se* coercive, and this conduct did not warrant setting aside the election on the CNA case;

3. The Regional Director, Region 22 erred in depriving the Employer of an appropriate hearing on all issues relevant to the Employer's Objections to the handling of CNA case by relying on the decision in the LPN case. Namely, the LPN case decision relied upon by the Regional Director was tainted by the conduct of the Hearing Officer, who prevented the Employer from cross-examining the Petitioner's witnesses to gauge their credibility ; this violated the Act's guarantee of an appropriate hearing and due process. (Appx. C at 236-237; 292-293; 311-312).

4. 4. The Regional Director, Region 22 erred in applying the wrong standard in evaluating the departures from the Board's Casehandling Manual with respect to appropriate language on Notice of Election, and the conduct of a Board Agent depriving the Employer of its Election Observers at a critical part of the election in each case.

5. The Regional Director, Region 22 erred in finding that unit hearings in each of the combined cases should not be reopened for the Employer to present evidence under the appropriate unit standard of *PCC Structurals.*

II. ARGUMENT AND CITATION OF AUTHORITY

A. The Regional Director, Region 22, Erred In Adopting The Finding Of The Acting Regional Director, Region 4, That The ManorCare Yeadon LPNs Were Not Section 2(11) Supervisors, And In Relying On That Finding To Overrule The Employer's Election Objection 2.

As described above, the Employer contested the validity and processing of the LPN case petition, in part, on the basis that the petitioned-for unit was comprised of LPNs who were all

supervisors under Section 2(11) of the Act. A hearing on the petition was held in Philadelphia on April 19 and 20, 2017. The Honorable Mary Leach presided as the Hearing Officer. (Appx. C).

On multiple occasions during the hearing, Hearing Officer Leach improperly prohibited counsel for the Employer from questioning the credibility of Petitioner's witnesses, either by sustaining the objection of the Petitioner, or stopping the inquiry *sua sponte.* Counsel for the Employer objected to this limitation, arguing that disallowing such questions was contrary to the Federal Rules of Evidence and constituted a fundamental denial of due process; however, the Hearing Officer refused to revisit her ruling, claiming that credibility resolutions were irrelevant to the statutory question of supervisory status, and that the fact finder would only be concerned with the facts on the administrative record. (Appx. C at 236-27; 292-293; 311-312).

Despite being unreasonably restricted in making its case, the Employer was still able to present uncontroverted evidence establishing that the Yeadon LPNs were supervisors under Section 2(11) of the Act. Specifically, this evidence conclusively demonstrated that the LPNs possessed supervisory authority, and that this authority was both actual and exercised.[3] Nevertheless, despite this determinative showing, on May 25, 2017, the Acting Regional Director of Region 4 flatly dismissed the Employer's arguments, erroneously finding that the evidence presented was insufficient to establish the supervisory status of the LPNs. (Appx. W).

Thereafter, the cases were consolidated and transferred to Region 22 for processing. Prior to a scheduled hearing on the consolidated cases, the Regional Director, Region 22 issued an Order clarifying the issues to be litigated at the hearing, in which he explicitly precluded the parties from introducing any evidence relating to the supervisory status issue. (Appx. CC). Subsequently, in

[3] *See* Appx. V, Employer's Brief to Hearing Officer, this Brief, and the official transcript of that hearing, Appx. C, are incorporated by reference herein.

his resulting Direction and Certification of the Consolidated Cases, the Regional Director – having never considered any evidence on the issue – simply adopted the Acting Regional Director's previous erroneous conclusion without elaboration, declared that the Yeadon LPNs were not supervisors, and overruled Employer's Objection 2 in the CNA case. (Appx. EE). The Employer submits that all of these actions were erroneous and warrant granting of the Request for Review.

1. The Evidence Established That The LPNs Are Section 2(11) Supervisors

The underlying facts of this dispute are set forth in the record of the representation hearing. To this end, the operation in question, ManorCare Health Services-Yeadon, is licensed by the State of Pennsylvania, and provides long term care and resident services in a facility with 198 beds. It employs approximately 46 LPNs as part of its team of caregiving professionals.

According to the uncontroverted testimony of HR Director Joseph Melfe, the LPNs working at the Yeadon facility have been supervisors during all four years of his tenure. As supervisors, the LPNs all perform the same duties, and all are classified as Nurse Supervisors. (*See,* Appx. E). LPNs are expressly advised of their "supervisory/people management responsibilities" in their job descriptions, and they sign these documents as "Nurse Supervisors." Meanwhile, the job descriptions for Nurse Aides (CNAs) show that they report to Nurse Supervisors. (Appx. C). These documents are maintained as official records in each employee's personnel file. (Appx. E; Appx. T; Appx. C at 45-46).

In addition to job descriptions outlining their supervisory responsibilities, the record shows that LPNs also receive a manual entitled "A Handbook for Managers and Supervisors." (Appx. F [Emp. Exh. 7]). Among the topics covered in that manual are sections on "Handling Complaints and Grievances," "Conducting Performance Reviews," "Appropriate Performance Counseling,"

and "Guidelines for Proper Discipline." (*Id.*) Upon receiving their manual, each LPN is required to sign an acknowledgment of receipt which expressly states, in part, as follows:

> I understand and agree that I am a supervisor and it is my responsibility to counsel employees, issue disciplinary action, interview, screen and hire new employees, grant time off, transfer or call in employees to cover staffing needs, train and orient new employees, make work assignments, approve overtime, suspend and/or discharge employees, adjust employee complaints or grievances, evaluate employee performance and recommend pay increases, and carry out other supervisory duties as may be required.

This signed acknowledgement also becomes part of each LPNs employee personnel file. (Appx. J [Emp. Exh. 12]), In all, the fact that LPNs are specifically advised that they are supervisors, and are trained accordingly, is not disputed; indeed, for many years, even their name tags read, "LPN Nurse Supervisor," until state requirements mandated deletion of the word supervisor from both RN and LPN badges. (Appx. C at 69-70).

In further reflection of their supervisory status, LPNs receive substantially higher pay than the CNAs they supervise, and are part of a higher level benefits category. Moreover, their salaries are also directly tied to their supervisory role, as LPNs are specifically evaluated on how well they perform as supervisors. To this end, one of the categories on their appraisal form (which is not included in the form to appraise CNAs) requires the evaluator to assess the competency in which an LPN "Provides supervisor to nursing assistants, including daily assignments, daily reports from CNAs and performance evaluations." (Appx. K [Emp. Exh. 13]) (emphasis supplied.) Because the results of an LPN's appraisal are used to calculate merit increases, the assessed level of an LPN's performance as a supervisor has a direct and material impact on their wages. This, too, demonstrates that LPNs have responsibility for direction of CNAs as subordinate employees, and that providing competent supervision is not only a requirement of their employment, but is, in fact, a quantifiable factor in their salaries, as well.

a.. **Employee Merit Increases**

The role played by the Yeadon LPNs in determining annual employee merit increases is a conclusive indicator of their 2(11) status. To this end, the process of conducting performance appraisals for CNAs and other employees at Yeadon is codified in a specific policy on appraisals. (Appx. G [Emp. Exh. 9]). According to this policy, CNAs and other employees receive a first appraisal after completing 90 days of employment. This is to ensure that they possess the competency to remain employed, and this determination is made by the evaluator. If the evaluator concludes that the employee should be retained, the employee receives a wage increase for having successfully completed their probationary period. (Appx. I; Appx. C at 71-78; 84-86; Appx. N).

Appraisals are also conducted for the purpose of determining annual merit increases. The amount of an increase is directly related to the "score" attributed to the employee by the supervisor conducting the appraisal. (*See id.*)

The form used in these performance appraisals provides for the subject employee to be evaluated in numerous areas of performance, including the following:

1. Follows all schedules, corporate compliance guidelines, standards of business conduct and company policies (such as attendance, punctuality, dress code and work ethic).

2. Communicates appropriately and effectively with others to accomplish goals and meet patient/resident needs; resolves conflict with minimal supervisor involvement required.

3. Demonstrates independent and effective decision making; is able to prioritize and organize tasks efficiently.

4. Provides quality service in a caring environment; establishes customer expectations and works to exceed them; performs all duties according to job description.

5. Coordinates services with other departments to work effectively toward common goals.

6. Thoroughly documents and maintains record of patient/resident care provided according to established protocols.

7. Provides patient care within the scope of the nursing assistant responsibilities, under the direction of the license nurse.

8. Interacts with patients, families, co-workers, visitors and other customers in tactful, diplomatic and caring manner.

(Appx. H [Emp. Exh. 10]; Appx. C at 73-74)

The CNAs' performance in those specific areas, as well as others, is evaluated as being either "exceptional," "successful," or "needs improvement." (Appx. H [Emp. Exh. 10]; APpx. V at 73-74). These individual evaluations are then used to determine an employee's overall assessment level.

Each year, employees receive merit increases that directly correlate to the level indicated by their overall scores. For example, in 2016, the following guidelines were used to determine an employee's increase according to their level of performance:

Overall Performance Level	Merit Increase Guide	Merit Increase Guide
Needs Improvement	Less than 1%	0% up to 1.0%
Successful	Up to 1.6%	1.0% to 1.6%
Exceptional	Up to 2.0%	1.6% to 2.0%

(Appx. D [Emp. Exh. 18]; Appx. C at 76-78).

And similarly, in 2017, the range for increases was as follows:

Merit Increase Guide for 2017

PERFORMANCE LEVEL	**MERIT INCREASE ASSOCIATED WITH PERFORMANCE LEVEL**
Exceptional and Successful	Up to 2.0%
Needs Improvement	Less than 1.0%

Thus, the overall performance category assigned to an employee has a direct bearing on the amount of an employee's merit increase for any particular year.

The fact that LPNs perform these annual evaluations of the CNAs they supervise is uncontroverted. The record is replete with numerous examples (33, in fact) of LPNs evaluating CNAs. (Appx. N; Appx. C at 84-86). And, on each such evaluation, the LPN signs the form on the line marked "Supervisor." (Appx. N)[4] Accordingly, by exercising their independent judgment and gauging the individual performance of their subordinates, the Yeadon LPNs have a direct, measurable, and undisputed impact on the terms and conditions of a Yeadon CNA's employment.

b.. **Disciplinary Authority**

In addition to conducting probationary and annual evaluations, the record shows that the Yeadon LPNs are quite familiar with and regularly issue coaching/counseling forms to CNAs, as well. Often referred to as "FESAs," these forms are intended to document the expectations that an LPN may have for a particular CNA's performance. They are used to make a formal record of the following:

F (Facts that require improvement)

E (Expectations that have not been met)

S (Solutions that you are willing to do to meet the expectations)

A (Actions that we will take when you meet the expectations **or** follow up should you not meet expectations)

Once issued, a FESA becomes a permanent part of the CNA's employment record. Moreover, FESAs may be issued independently by the LPNs without higher authorization (and, in practice, this is usually the case). (Appx. C at 52-53; 92-95).

FESAs are a crucial component of the Yeadon progressive disciplinary system, reflecting the Employer's belief that employees should be apprised of management's expectations before

[4] The record shows, and the Employer does not dispute the fact, that some CNAs may be evaluated by RN Nurse Supervisors instead of an LPN; both RNs and LPNs supervise CNAs, so this is to be expected.

receiving any higher level discipline. The issuance of FESAs by the LPNs provides such notice to the nurse aides working at the facility. A selection of FESA forms was entered into the record, but the following examples are reflective of typical FESAs that are issued by Yeadon LPNs:

FESA Form 1

Employee: Janelle Burton (CNA)

F: Janelle B. left the resident in dining room unattended without telling the nurses or fellow workers. Yelling at nurse when asked to put resident in bed.
E: Should stay with resident in dining room when assigned to them. Talk to nurse with respect and not yelling at their face.
S: Needs to notify supervisor and co-workers before leaving the floor. Talk to nurse with respect.
A: Discipline action taken.

Supervisor Sign: Joyce Wesley (LPN Supervisor) – 4/1/17.

(Appx. L [Emp. Exh. 14-a.]).

FESA Form 2

Employee: Darice Cook (CNA)

F: Resident was left uncovered, bed elevated in air, and call light out of reach.
E: Resident was not left in safe position and dignity expectations were not met.
S: Make sure resident's bed is maintained at lowest position.
A: Continued behavior pattern could lead to further disciplinary action.

Supervisor Sign: Nicole Peart (LPN Supervisor) – 3/16/17

(Appx. L [Emp. Exh.14-b]).

FESA Form 3

Employee: Steffan Cook (CNA)

F: On August 23rd,, 2016 you were assigned to resident in room 117A. She was not given incontinent care in a timely manner as her brief was saturated and resident clothing was saturated with urine.
E: Your assignment should be to maintain dignity to resident at all times.
S: Your assignment will be completed as per nursing protocol.
A: Continuation of this behavior may lead to further discipline or termination.

Supervisor Sign: Nicole Peart (LPN Supervisor) – 8/25/16.

(Appx. L [Emp. Exh. 14-d]).

FESA Form 4

Employee: Sia Pessina (CNA)

F: Linen left in resident's bathroom on floor.
E: Follow up to make sure nothing is left in resident room before shift is over.
S: Check resident's bathroom trash can around 2:30 to make sure nothing is left behind
A: Further discipline will be implemented if behavior continues.

Supervisor Sign: Andrea Graham (LPN Supervisor) – 9/23/16.

(Appx. L [Emp. Exh. 14-e]).

FESA Form 5

Employee: Kadiatu Sankoh (CNA)

F: On April 4th, 2017, you were assigned to resident when she was transferred from room 118B to 105A her personal belongings were not put away. They remained on cart until 4/5/17 and were put away by 7-3 shift staff.
E: You did not follow through on a task that was delegated by charge nurse.
S: Resident personal belongings should be placed in appropriate closet and drawers.
A: Further disciplinary action will be taken if expectations are not met.

Supervisor Sign: Diane McBride (LPN Supervisor) – 4/5/17

(Appx. L [Emp. Exh. 14-f]).

Uncontroverted record testimony further established that violating the warnings contained in the FESA would result in the receipt of formal discipline. (Appx. C at 52-54). Accordingly, this evidence conclusively established that in addition to determining wages, LPNs also possess, and exercise, the authority to unilaterally issue discipline, thereby further impacting CNA employment. This, too, serves as an independent basis to find supervisory status. *Id.*

Despite the undisputed documentary evidence showing that Yeadon LPNs possess at least two of the factors used to establish supervisory status, the Acting Regional Director of Region 4

refused to recognize this determinative showing. Instead, he inexplicably and unreasonably held that, in order to meet its burden, the Employer was required to provide testimonial evidence of supervisory status, including examples of specific situations involving the exercise of authority. Further, rather than relying on the clear documentary evidence which categorically demonstrated LPNs engaging in their supervisory functions, the Acting Regional Director instead credited the anecdotal testimony provided by Petitioner's witnesses about their personal perceptions relating to evaluations and discipline – testimony which the Employer was specifically foreclosed from impeaching. Accordingly, rather than conducting a clear-eyed review of the objective evidence to determine whether LPNs were statutory supervisors who possessed the requisite authority to materially affect the terms and conditions of the CNAs' employment – which would have been the appropriate approach – the Acting Regional Director turned the question of supervisory status into a *subjective* inquiry, with the determination dependent on how the LPNs *felt,* or what they knew, about the authority they possessed. This was not the appropriate question – it was not even a relevant question – and it is certainly not the Board's standard.

Nor is it the Board standard to hold that supervisory status is automatically lost if the putative supervisor's action must be approved in any way. Although the Board has never held that such oversight is fatal to a supervisory designation (and in reality, the practice of having a higher-level supervisor "sign off" on forms is standard across most industries), the Acting Regional Director found that, because RNs signed off on evaluation forms independently completed by LPNs, this rendered the LPNs' involvement meaningless. Again, this is not the law – not only does it ignore the practical realities of business, it also ignores the fact that, even where a higher supervisor's signature is required, it is the initial supervisor's input that is still operative. At the very least, the initial supervisor would be "effectively recommending" a particular action, which

is also sufficient to demonstrate statutory supervisory status. Accordingly, here, too, the Acting Regional Director's decision is inconsistent with well-established Board precedent, and was erroneous as a matter of law. *See, University of Southern California.* 365 NLRB No. 11 (2016) (Miscimarra, Dissent).

In all, the subjective testimony provided by the Petitioner's witnesses cannot controvert the inexorable fact that LPNs both possessed, and exercised, independent supervisory authority with respect to both evaluations and discipline. The fact that LPNs materially affect the terms and conditions of CNA employment is clear; the fact that they complete documents that have a direct impact on a CNA's wages and ongoing employment is undisputed. As the Regional Director ignored this determinative evidence of supervisory status, and instead based his decision on the personal opinions of Petitioner's witnesses, his finding that the Yeadon LPNs were not Section 2(11) supervisors.is wholly inconsistent with Board precedent, and his erroneous conclusion should not have been adopted in the consolidated cases.

Although the Acting Regional Director's this finding was clearly erroneous, the Employer found itself subsequently bound by it, and foreclosed from requesting review. To this end, following the two elections and the transfer of the cases, the Employer sought clarification from Region 22 as to the issues to be litigated in the Hearing on Objections. In response, the Regional Director issued its clarification order, limiting the scope of the hearing and explicitly preventing the Employer from challenging the Acting Regional Director's finding that Yeadon LPNs were not Section 2(11) supervisors (Appx. CC). This made evidence of LPN interference in the CNA election irrelevant, and inadmissible, given the Order.

As a result of this ruling, Employer was denied the opportunity to demonstrate that the Acting Regional Director's supervisory finding was in clear error, or that the record the Acting

Regional Director had relied upon – and which contained the subjective impressions of the Petitioner's witnesses – was fundamentally flawed, as the Employer had been denied the basic right to cross examine witnesses at the hearing. Indeed, by excluding the issue of supervisory status from the hearing, the Regional Director allowed the errors from the underlying proceedings to evade review, even as they continued to bind the Employer and inform the outcome of both cases. But for Hearing Officer Leach's initial denial of the Employer's right to due process at LPN hearing, these cases may have been decided differently; as it now stands, however, every ruling that has followed has flowed from that initial violation, and constitutes fruit from that original poisonous tree. As such, and as discussed below, the Employer respectfully requests that the Board grant its request for review of the Acting Regional Director's erroneous supervisory status finding, and finally afford the Employer the opportunity to be heard on this issue.

2. The Acting Regional Director, Region 4, Should Have Concluded That The Record Evidence Demonstrates That The Yeadon LPNs Are Supervisors Within The Meaning Of Section 2(11).

As described above, although the Employer was impermissibly foreclosed from questioning the credibility of the Petitioner's witnesses (and thereby casting doubt on their conclusive testimony) the Employer was nonetheless able to present conclusive evidence that the Yeadon LPNs were supervisors within the meaning of Section 2(11). Accordingly, for the reasons described below, the Acting Regional Director's Decision should not be sustained, and his erroneous finding should not be relied upon in the consolidated cases.

It is well-settled that supervisory status under the NLRA depends upon whether an individual possesses authority to act in the interest of the employer in the matters and in the manner specified in Section 2(11) of the Act, as follows:

> The term "supervisor" means any individual having authority, in the interest of the employer, to hire, transfer, suspend, lay off, recall,

> promote, discharge, assign, reward, or discipline other employees, or responsibly to direct them, or to adjust their grievances, or effectively to recommend such action, if in connection with the foregoing the exercise of such authority is not of a merely routine or clerical nature, but requires the use of independent judgment.

Possession of any one of these enumerated factors is sufficient to confer supervisory status, so long as the authority can be exercised with independent judgment and not in a routine manner. *Oakwood Healthcare, Inc.*, 348 NLRB 686 (2006); *NLRB v. Kentucky River Community Care, Inc.*, 532 U.S. 706, 711 (2001). Moreover, "the question of supervisory status is determined by whether or not the individual possesses supervisory authority, not by whether or not the individual *exercises* such authority." *Formco, Inc.*, 245 NLRB 127, 129 n.7 (1979) (emphasis in original). *See also, Starwood Hotels & Resorts Worldwide, Inc.*, 350 NLRB 1114, 1118 (2007).

a. **Evaluations**

The Board has long recognized that the exercise of independent judgment in completing evaluations that are subsequently used to award merit increases is a *per se* indicator of supervisory authority. Indeed, in a nursing home context, the Board found LPNs to be supervisors simply on the basis of their role in evaluations. *Bayou Manor Health Center*, 311 NLRB 955 (1993). In that case, under facts like the ones presented here, the Board held that, where evaluations completed by the LPNs affected the CNAs' salaries, a direct correlation existed between the evaluations and the merit increases:

> It therefore follows that the employer's LPNs, except those working as medication and treatment LPNs, are statutory supervisors within the meaning of Section 2(11) of the Act. See *Health Care & Retirement Corp.*, 310 NLRB 1002 (1993).

311 NLRB at 955. The outcome in the instant case should be no different. Here, the undisputed evidence establishes that Yeadon LPNs complete evaluations for CNAs, and that those evaluations serve as the basis for calculating CNA merit increases. Accordingly, consistent with the precedent

contained in *Bayou Manor*, the Yeadon LPNs should have been found to be statutory supervisors in this case. (Appx. C at 46, 51, 71-78, 159-167; Appx. G; Appx. H; Appx. I; Appx. O; Appx. P; Appx. U).

b. **Authority to Discipline**

Similarly, 2(11) status is also conferred upon the Yeadon LPNs through their issuance of discipline. To confer supervisory status, the exercise of disciplinary authority must lead to personnel actions without independent investigation or review by management. *G4A Government Solutions, Inc.*, 363 NLRB No. 113 (2016), citing *Franklin Home Health Agency*, 337 NLRB 826, 830 (2002).

Indeed, the record establishes that the LPNs at Yeadon have, and regularly exercise, the authority to issue FESAs to the CNAs they supervise; it also establishes that they may do so independently and without approval from anyone else. Moreover, when an LPN issues a FESA for a rules infraction or poor performance, if the CNA repeats the prohibited conduct, he or she will receive a higher form of discipline. (Appx. C at 47, 52-54, 92-95, 167-73; Appx. L). As such, these forms are not merely reportorial; to the contrary, they have a concrete impact on the progressive disciplinary process, and are directly linked to further disciplinary action. *Compare: Ten Brock Commons*, 320 NLRB 806 (1996); *Ken-Crest Services*, 335 NLRB 777 (2001). Thus, for this reason as well, the Yeadon LPNs should have been found to be supervisors within the meaning of 2(11).

In arriving at a contrary conclusion, the Acting Regional Director misconstrued applicable law under Section 2(11) and disregarded the uncontroverted authority of the LPNs to issue FESA forms and to issue first step warnings as discipline. But this was inappropriate, as the sole inquiry for purposes of Section 2(11) is whether or not the written counseling issued by LPNs to their

subordinates had an impact on the applicable progressive disciplinary process. The Employer's evidence is uncontroverted that it did, and that the LPNs did have that authority. (Appx. C at 47, 52-54, 92-95, 167-73; Appx. L). Moreover, it is well-settled that written counselings are discipline, regardless of whether or not the written counseling results in future disciplinary action. A warning need not "*automatically* lead[] to an action affecting employment.... [I]t is sufficient that the discipline has the real potential to lead to an impact on employment." *Progressive Transp. Servs. Inc.,* 340 NLRB 1044, 1046 (2003). The Board also has explained that write-ups are a form of discipline where they "lay a foundation, under [a] progressive disciplinary system," for later personnel action, such as suspension or termination. *Oak Park Nursing Care Ctr.,* 351 NLRB 27-29 (2007).

This is supervisory authority under Section 2(11), and precisely what was at issue in *Oak Park Nursing Care Ctr.*, 351 NLRB 27, 29 (2007). There, the Board found that:

> LPNs here have the discretion to document employee infractions on the counseling forms. In this respect, the LPNs alone decide whether the conduct warrants a verbal warning or written documentation. Because the LPNs here have the discretion to write-up infractions on employee counseling forms, we believe that they are vested with the authority to exercise independent judgment in deciding whether to initiate the progressive disciplinary process against an employee.

At Yeadon, the LPNs have the authority to issue written discipline that can lead directly to further, and more serious, discipline, depending upon the employee's response to the write-up. Like the LPNs at *Oak Park,* Yeadon LPNs operate with the discretion to decide whether to ignore improper conduct, verbally counsel an employee, educate an employee, or issue written discipline in the form of a FESA. (Appx. C at 47-55, 92-95, 170-173; Appx. L). This is precisely the same reasoning utilized by the Board in *Oak Park;* accordingly, if the *Oak Park* LPNs are supervisors,

then the Yeadon LPNs must be supervisors, too. The Acting Regional Director's Decision erred in this respect, as well.

c. "Responsibly directing" CNAs

As to whether the LPNs "responsibly direct" the work of their CNA staff, the Board's analysis in *Oakwood Healthcare 348 NLRB 686* is instructive. There, the Board held that:

> [T]o establish accountability for purposes of responsible direction, it must be shown that the employer delegated to the putative supervisor the authority to direct the work and the authority to take corrective action, if necessary. It also must be shown that there is a prospect of adverse consequences for the putative supervisor if he/she does not take these steps.

There is no question that, under the facts of this case, this portion of the Board's analysis is satisfied. The LPNs have clearly been given the responsibility for delegating work to their CNA staff and to direct the staff in their daily tasks. Beyond that, the record reveals that the LPNs are ultimately responsible for the actions of the staff under their supervision and are evaluated by their managers on how well they supervise the CNAs. Consequences have, in fact, been imposed when an LPN failed to properly supervise CNA staff. (Appx. C at 97-100, 174-176; Appx. M). In any event, a showing of accountability requires only a showing of "a *prospect* of consequences," and not a showing of *actual* consequences, as erroneously mandated by the Acting Regional Director. *Golden Crest*, 348 NLRB 727, 731 (2006) (*citing Oakwood Health Care*, 348 NLRB 686, 692 (2006). Simply put, the evidence that LPNs are held accountable for the direction they provide CNAs and are evaluated on that category of performance was clear. (Appx. C at 87-92, 97-100, 174-176; Appx. K; Appx. M; Appx. R; Appx. S). Accordingly, there can be no reasonable dispute that the LPNs "responsibly direct" the CNA staff, and for this reason as well, the Acting Regional Director's Decision was in error.

While, clearly, there were multiple problems with the Acting Regional Director's Decision, arguably, the most fundamental flaw was that he ignored the preponderance of evidence that

proved the supervisory status of the Yeadon LPNs. To this end, "[w]hen the Board purports to be engaged in simple factfinding, unconstrained by substantive presumptions or evidentiary rules of exclusion, it is not free to prescribe what inferences from the evidence it will accept and reject, but must draw all those inferences that the evidence fairly demands." *Allentown Mack Sales & Serv., Inc. v. NLRB*, 522 U.S. 359, 378 (1998). As such, the Board (and the Acting Regional Directors to whom the Board has delegated its authority for representation case hearings) may not pick and choose which facts it chooses to take into consideration; it is mandated to draw all inferences suggested by the facts. Indeed, drawing such inferences is the Board's "obligation." *Id.*

Here, the Acting Regional Director did not meet that obligation. Instead, he disregarded the testimony of Joseph C. Melfe, Jr., as well as the more than ample documentary evidence establishing that LPNs supervise CNAs. This was not a situation where the Employer objects to a questionable credibility determination; this was a matter of conclusive, undisputed, objective evidence being totally ignored. Thus, for this reason as well, the Employer respectfully submits that the Acting Regional Director's Decision is erroneous as a matter of law.

In sum, in light of the facts presented, the proper application of the Board's precedent leads to the conclusion that the Yeadon LPNs are Section 2(11) statutory supervisors. Given the role that they have in evaluating work, thus influencing pay, and effecting discipline, with responsibility for the supervision of CNAs, the LPNs clearly meet the test for supervisory status under the Act. As such, the Employer requests that the Board grant this Request for Review on the issue of the supervisory status of the LPNs under Section 2(11). On review, the Board should re-examine the record evidence and properly conclude that the LPNs are 2(11) supervisors.

3. The Regional Director Erred In Overruling Objection 2 in the CNA Case Because The LPNs Were Supervisors, And The Regional Director's Order Clarifying the Issues To Be Litigated At The Hearing Prevented The Employer's Introduction Of Evidence On Objection 2.

In his November 13, 2018 Decision and Certification, Regional Director for Region 22 adopted the finding of the Acting Regional Director of Region 4 in the LPN case and, on that basis, overruled Objection 2 in the CNA case. Subsequently, in a footnote to his Decision, he found that even if the LPNs were supervisors, the record "does not support a conclusion that any LPNs engaged in conduct which would constitute "supervisory taint" and/or affect the showing of interest or the election results." (Appx. EE at fn. 6). This conclusion, however, ignores the fact that the Employer was prohibited for presenting evidence on that precise issue, by the effect of his own Order. (Appx. CC). As such, the Employer submits that the Regional Director's actions warrant granting the request for review for the following reasons.

In issuing the Order Clarifying Issues to be Litigated at Hearing, the Regional Director, Region 22 announced that the LPN case findings would control in the consolidated cases, thereby designating the Assistant Regional Director's findings as the "law of the case." Because he declined to address the supervisory issue, and viewed the status of the LPNs as a foregone conclusion, the Employer had neither the obligation nor the ability to provide evidence of objectionable conduct by LPNs. By his own order, the Regional Director himself made that issue of supervisory conduct irrelevant. (*See,* Appx. CC).

Moreover, as described above, the Regional Director's reliance on the Acting Regional Director's Decision was in error, because the Acting Regional Director's Decision was in error. And, that Decision was in error, because the record of the hearing was incomplete, as a result of the Hearing Officer blocking counsel for the Employer's multiple attempts to cross examine Petitioner's witnesses to demonstrate their lack of credibility on the supervisory status issue. (Appx. C at 236-237, 292-293, 311-312). As noted above, that poisonous tree then became the basis for a lot of fruit – first, the Acting Regional Director's finding that the LPNs were not

supervisors, and then, the Regional Director of Region 22's adoption of that finding, establishing the LPN case Decision as the law of the land. Because of this tainted precedent, the Employer had no way to create a record of supervisory interference, and as a result, the Regional Director deprived the Employer of its right to an appropriate hearing on the objections,.

Thus, for this reason as well, the Board should grant the Employer's Request for Review on these issues, all of which are related to the supervisory status of the LPNs.

B. The Board's Representation Case Regulations Are Invalid On Their Face,And As Applied In This Case.

In the Decision and Certification of the Consolidated Cases, the Regional Director erred in rejecting ManorCare's argument that the R Case Regulations are invalid on their face, and invalid as applied here, and thereby overruling Employer's Objection 1 in the LPN Supervisors case, and Objection 3 in the CNA case. (Appx. EE at 5-8, 21-23).

The Employer requests review of this conclusion, and submits that the Board's Regulations are invalid on their face, and should be revisited. To this end, and in agreement with a number of dissents authored by former Board Chairman Miscimarra, the Employer contends that *Pulau* was wrongly decided. *See, European Imports,* 365 NLRB No. 41 (2017) (Dissent)*; Durham School Services, L.P*, 2015 WL 6735642 (2015) (Dissent); *Pulau Corp.*, 363 NLRB No. 8 (2015) (Dissent). Specifically, the Employer submits that the Board should adopt the positions taken by former Members Miscimarra and Johnson, and correspondingly hold that the Regulations at issue are facially invalid in that they violate the National Labor Relations Act, the Administrative Procedures Act ("APA"), and/or the U.S. Constitution. (*See*, Appx. HH [Dissent to issuance of Regulations, incorporated by reference herein]).

The Employer contends that the Regulations are invalid for one or more of the following reasons:

1. The regulations deny the Employer a realistic opportunity to express free speech protected by the Act and the U.S. Constitution, thus also violating the APA;

2. The regulations compel speech by the Employer in violation of the Act and the U.S. Constitution, thus also violating the APA;

3. The regulations deprive employees of a realistic opportunity to hear the message from all sources, including other employees, third parties, the Employer, and the Petitioner, fundamentally undermining their rights established under the Act;

4. The regulations violate the Act and the U.S. Constitution by eliminating any realistic possibility of intervention by an intervening labor organization;

5. The regulations exceed the Board's jurisdiction under Section 9 of the Act, and, thus violate the APA: the Board under Section 9 of the Act "shall provide an appropriate hearing upon due notice" for determining questions concerning representation; however, the regulations have eliminated an "appropriate hearing upon due notice" because issues are precluded from being heard and the timeliness under the regulations is so short that fair presentation of evidence of all facts relevant to the Section 9 question concerning representation is impaired;

6. The regulations violate the Act and the APA because they interfere with employees' ability to exercise their Section 7 rights under the Act freely in that they force the Employer to provide confidential employee information to Petitioner without the consent of the employees – employees who might wish to refrain from some or all Section 7 activity, including hearing any, some; or all communication from any and/or all petitioning labor organizations;

7. The regulations violate the APA because they were adopted in an arbitrary and capricious manner, not as an objective interpretation Act, but instead, as a one-sided interpretation of the Act wholly inconsistent with the balance that was the intent of the Act after the Taft-Hartley amendments; the public record associated with the Board's adoption of the regulations plainly demonstrates the one-sided interpretation of the Act, consistent only with pre-Taft-Hartley Act federal labor law, and application of that interpretation culminating in the current regulations; and

8. The regulations violate the Act and the U.S. Constitution due process protections because they deprive employees of the right to vote for or against union representation while knowing the exact voting unit of employees that will be eligible for establishing a majority in a bargaining unit to be certified under the Act; employees are entitled to know what voting group is voting and eligible to be voting, and what the bargaining unit is that might or might not be established by the election; by establishing a procedure that permits voting in an election before the "descriptive boundaries" of the voting and bargaining unit are determined and

applying that procedure, the regulations impermissibly deprive or interfere with the ability of employees to vote meaningfully.

Further, the Employer submits that the Board in *Pulau* only considered the narrow argument that the Regulations are invalid on their face; that *Pulau* was wrongly decided; and that the Board, on consideration of the application of the Regulations in these consolidated cases, should grant the Request for Review to consider these issues. *See generally, European Imports,* 365 NLRB No. 41 (2017) (Dissent)*; Durham School Services, L.P*, 2015 WL 6735642 (2015) (Dissent); *Pulau Corp.*, 363 NLRB No. 8 (2015) (Dissent).

The Employer further submits that the sheer volume of prejudicial error that occurred in the instant elections make this case an attractive vehicle for reconsideration; indeed, when applied to the underlying facts of this case, the Regulations have proven to be unreasonable, unfair, and highly prejudicial to the Employer. Moreover, the problems resulting from the Regulations resulted in numerous violations of the Act. Specifically, the problems inherent with the application of the Regulations here lead to the following:

1. The three days posting of the notice of election was not enough time, given the unit scope issues raised in both these cases (as well as two other Board representation cases involving other employers at the same facility); the confusion caused by Region 4's error in scheduling the election dates; and Region 4's failure to include appropriate information required by Sections 11512.1 and 11512.1(a) of the Casehandling Manual to inform employees that the reason for the delay was not the fault of the Employer;

2. The Region 4 Agent conducting the elections deprived the Employer of its observer for the elections by not permitting the designated employee to perform the duty of checking the markings of votes on the ballots and counting the votes;

3. The bargaining unit composition and scope were not finally determined by the Board before the elections;

4. The supervisory or non-supervisory status of LPNs was not finally determined by the Board before the election, despite the fact that voters are entitled to know the precise scope of the unit they are voting on before they vote, and to have time to obtain and process information relevant to the vote, including information about procedural irregularities that could cause confusion over who might be at fault for delay;

5. The Region 4 D & D conclusions with respect to the supervisory status of the LPNs were based on hearings in which the Region deprived the Employer of its right to challenge the credibility of Petitioner witnesses and then those conclusions were adopted by the Regional Director in the Combined Cases case D & C, thus depriving the Employer of the opportunity to cross examine Petitioner's witnesses as to credibility; and

6. In each of the three hearings in the Combined cases, the Region's application of the R case Regulations deprived the Employer of the opportunity to argue and introduce evidence on all relevant issues, thus violating the Act's requirement of an appropriate hearing and the guarantee of Due Process under the Constitution.

Here, the Regional Director's handling of the Employer's Objection to the mere three days of notice between the Decisions and the elections illustrates how the R Case Regulations are, on their face, invalid, and how they can predictably lead to an application that violates the Act and the Constitution. Despite the obvious unfairness, prejudice, and hardship that the Regulations caused in this case, the Regional Director recommended rejection of the Employer's Objections as to the three-day notice period solely on the grounds that the Board Regulations require only posting of the official notice for the minimum of three days; however, the Employer submits that the Board's Regulations as a whole, not simply the three-day official notice posting requirement standing alone, are facially invalid, and represent an inherent denial of due process, as evidenced by how they were applied in the instant case.

Consistent with the position of former Board Chairman Miscimarra in his multiple dissents, the Employer contends that three days' notice between a D & D and an election does not constitute sufficient notice under the Act for voters to be sufficiently informed. *See European Imports,* 365 NLRB No. 41 (2017) (Dissent)*; Durham School Services, L.P*, 2015 WL 6735642 (2015) (Dissent); *Pulau Corp.*, 363 NLRB No. 8 (2015) (Dissent). Specifically, the Employer asserts that the former Chairman's dissenting view is a correct interpretation of the Act, and that the two elections here should be set aside on the basis that the minimum three days' official notice posting

period of election provided for under the Board's Regulations, and as applied by the Regional Director here, was insufficient for employees to hear from all sides and to form a considered opinion as to their vote. Moreover, contrary to the Regional Director's assertions, the mere fact that many employees voted does not show one way or another whether those voting employees were sufficiently informed to cast informed votes; it just shows that they cast votes.

While the facts underlying this case are unfortunate, they present a compelling vehicle for demonstrating the manner in which a three-day posting period can result in prejudice to both the Employer and the employees in their exercise of free choice under the Act. To this end, there were only three working days between the issuance of the Region's Amended Decisions and Directions of Election and the actual vote itself – the Amended Directions of Election were issued by Region 4 on May 26, 2017; subsequently, following the Region's mistake in setting an election date in each case, the original date was cancelled, and a new election was set for June 2, 2017. With the intervening weekend and Memorial Day holiday, this left the Employer with a mere three working days to communicate with potential voters before the election was to begin at 6 a.m. that Friday.

This limited period of time between the Regional Director's decision and the election was entirely insufficient for the Employer to address the issues raised in the Decisions on unit composition, particularly given that the cases were proceeding simultaneously. And, while this alone should be considered objectionable, the additional facts of the instant cases (namely the deficient notice and a fiasco created by the Petitioner intentionally serving unenforceable subpoenas and employees thinking they would be arrested for non-compliance) only compounded the problem – to this end, while the Employer's agents scrambled to coordinate a campaign consistent with the unit findings and the exclusion of numerous employees, some eligible voters undisputedly believed that the reason for the delay was actually due to the Employer. (Appx. DD

at 254-55, 333).[5] Ultimately, with no time to mitigate the damage, these false beliefs of voters generated by the Petitioner's conduct and the Region's failure to comply with clear provisions of the Casehandling Manual had the effect of misleading and confusing the voters, and possibly prejudicing them against the Employer, in the final three days before the election – days that were all there were – just three.

By blindly adhering to the three day minimum rule for the official notice posting as sufficient time for pre-election communications without any consideration of the surrounding circumstances, Region 4 purposely set the Petitioner up with the best chance of success, presenting the Petitioner with the opportunity to take unfair advantage of an already unfair situation. This is absolutely not how the Act is intended to operate, or how a fair election should be conducted; to the contrary, what happened at Yeadon is a worst-case scenario. But it is exactly what the R case rules promote, proving the point of Member Miscimarra's dissents. Accordingly, the Board should wholly reject the Regional Director's conclusion and recognize the inherent and practical inadequacy of three days allowed by Region 4 in these cases.

Here, the Regulations were applied to violate fundamental principles of the Act and rights of employees and the Employer; again, this is contrary to the purpose of the Act and its stated

[5] Human Resources Director Joseph C. Melfe, Jr., who is no longer employed by the Employer, testified that he was aware of the discontent and rumors circulating as a result of the delay. According to Melfe, various managers approached him and reported that employees "were blaming the company for the delay in the vote." (Appx. DD at 254). Melfe named two managers who approached him with this concern. (*Id.* at. 255). Melfe testified that he "didn't really do anything" to disavow employees from the notion. (*Id.* at 270). Melfe's testimony was confirmed by Unit Manager Keisha Sample, who testified that employee Gwenewta Campbell reported that the Manor Care staff "felt like Manor Care was switching the dates for the election." (*Id.* at 317). Finally, Administrator LaSalle testified that she, too, heard these concerns.

purpose of ensuring a free and fair election. Accordingly, the Regional Director's findings and certifications should not be sustained.

C. Region 4's Departures From Standard Procedures Of The Board's Casehandling Manual And Violations Of Regulations Applicable To Region 4 Regarding Observers Warrant Granting The Request For Review.

The Regional Director erred in finding that neither election needed to be set aside based on the Employer's objections to (1) Region 4's failure to include language in the notice of election of election informing employees of the reasons for the election date change, and (2) a Board Agent's directive, during the counting of ballots, that rendered it impossible for the Employer's Observers to perform their role. Both of these actions by agents of Region 4 were in violation of the provisions of the Board's Casehandling Manual, and under the appropriate standard for review of such conduct – which the Regional Director failed to apply – each action reasonably impugned the neutrality of the Board, and undermined the parties and employees' confidence in the election process. Accordingly, the actions thus warrant granting of the Request for Review.

1. The Notice of Election Failure

The facts here are not in dispute. One day after setting the date for the Yeadon vote, Region 4 rescheduled the elections and issued replacement Official Notices of Election with no explanation for why the elections' date had been changed from May 31st to June 2nd. (Appx. W; Appx. AA). In addition to the potential confusion caused by the posting of different notices and having the election moved, employees were left to speculate on the reasons for the delay. And, unfortunately, apparently some employees were convinced by the Petitioner to lay blame squarely on the Employer and to advise other voters of that false contention. (Appx. DD at 254-55, 333).

Indeed, the Petitioner regularly blamed the Employer multiple times for delays and mechanics of the Board process, and frequently communicated such bogus allegation to employees. (*Id.*)[6]

In analyzing this objection, however, the Regional Director improperly ignored the record evidence, and placed the burden on the Employer to prove that the results of the election – apparently through evidence of subjective opinions and thoughts of employees – were affected by the Region's failure. But an Employer never bears the burden of showing that employees were disenfranchised based on a subjective standard; rather, in the ordinary case, the question is whether the information heard by employees could reasonably, and objectively, affect the outcome of the election. *See, Cedars-Sinai Medical Center,* 342 NLRB 596, 597 (2004)(explaining that the Board "applies an objective standard, under which conduct is found to be objectionable if it has 'the tendency to interfere with the employees' freedom of choice[;]" subjective evidence of interference is not required). Applying the law in this case, where the Region inexplicably refused to provide simple language to explain its own scheduling error, it would be objectively reasonable for the employees to conclude that the absence of that language meant that someone else was at fault.

In this case, Region 4 itself is the reason for the problem. In these circumstances, the question is twofold: the first inquiry is whether it is reasonable to infer that the Board's neutrality was impugned; the second is whether the parties' confidence in the election process was undermined. *Allied Acoustics, Inc.,* 300 NLRB 1181 (1990). Here, the parties' confidence was

[6] Note also, for example, organizing committee member Karima Tolbert's testimony regarding the Union's subpoena of 32 employees for a unit clarification hearing; when asked why the employees were being subpoenaed, Tolbert testified that she told voters that ManorCare was "taking some of the workers to court. They wanted to know why. And I told them I don't exactly understand why, but it has something to do with them fighting to form a union. That was pretty much it." Tr. 80. Along those same lines, organizer Michelle Stewart blamed the timing of the unit hearing on the Employer, stating in her testimony "Normally, an employer don't schedule for us to have a hearing a day – three days before so it was kind of new and pretty fast." (Appx. DD at 62).

reasonably undermined by the Region's failure to follow its own directions for correcting incorrect impressions of employees as to cause for election rescheduling.

It is not unheard of for a Region to make a mistake, or to find that an election date must be changed, and the Casehandling Manual contains a process for dealing with this exact situation. Specifically, Section 11351.1 and 11351(a) provide the following directive:

> 11351.1 Notice of Election for Rescheduled Election
>
> …when the originally scheduled election did not occur through no fault of the parties, the standard notice of election **shall be modified** to include a statement that the election is being rescheduled for administrative reasons beyond the control of the employer or the union …
>
> 11351.1(a) Pattern Statement to be Included in Notice of Election
>
> NOTICE TO ALL VOTERS
>
> The election scheduled for _____ (date) has been rescheduled for administrative reasons beyond the control of the (Employer, Petitioner, or the Union, as the circumstances dictate). Therefore, a new election will be held in accordance with the terms of this notice of election.

(Emphasis added).

Notably, the Casehandling Manual uses the word "**shall**" specifically because such a clarification is critical to a fair election - but even with this clear solution, Region 4 refused to include this language, and instead, left voters with no explanation for the election's delay.

The Region's failure to comply with these sections should be grounds for setting aside the elections. Just as Election Notices attribute a re-run election to the conduct of a specific party, the principle of having an informed electorate required that the Region advise the Yeadon employees of what happened in this case. *See, generally, Lufkin Rule Co.*, 147 NLRB 341 (1964). This was, after all, the Region's error, and all that had to have been disclosed was that because of the Memorial Day holiday, the first date set for the election (May 31st) did not allow for compliance

with the Board's three-day posting rule. That simple disclosure would have removed any risk of conjecture or speculation; it also would not have given the Petitioner the opportunity to claim that the Employer was at fault. But without any language in the Notices of Election explaining what happened or why, the Election Notices were both deficient and objectionable, and voters were left in the dark.

To the extent that the Regional Director dismissed the Employer's Objections on the grounds that the Employer had "ample" opportunity to respond to any confusion prior to the election, this conclusion is completely unsupported: the Employer only had three days, and there was no evidence that the Employer issued any broad clarifying communications in that limited time.[7] To the contrary, while Administrator LaSalle testified that she tried to clear up the confusion when she was asked about the delay, there is no evidence that her assurances were disseminated, and no indication that they did anything to change the voters' perception. (Appx. DD at 164). Moreover, there is absolutely no evidence on the record that the entirety of voters – or even a majority of voters – knew the real reason the election had been postponed.

Beyond this, however, it is patently unreasonable for the Hearing Officer to imply that the Employer was under any affirmative obligation to remediate any misconceptions. The Employer did not create this problem – Region 4 did, by hastily scheduling an election without consulting a calendar. The Region then compounded the problem by rescheduling the election without explanation. This could have been an easy fix; all the Region had to do was add the language contained in the Casehandling Manual. It refused to do so, and its inexplicable omission caused

[7] Despite lacking any evidentiary basis for this finding, the Regional Director concluded that the Employer had time to correct any misinformation and that all employees would have known the facts.

harm. Accordingly, for this reason as well, the Employer's Objections should not have been overruled, and the election results should not be certified.

2. The Region 4 Agent's Directive Preventing Observers From Being Able To Perform Their Role

Unfortunately, Region 4's failure to follow established Casehandling procedures was not limited to the deficient notice; the proper procedures were also repeatedly abandoned or ignored by the Agents conducting the election.

Multiple witnesses at the Hearing established that the Board Agent tallying the vote of the election refused to allow observers, or any other witnesses, to view the marked ballots. While this comprised the weight of the evidence, the Regional Director, without explanation, credited two witnesses for the Petitioner who claimed that they could see the ballot counts – and he did so despite the fact that their testimony was contradicted by the Petitioner's other witnesses, who made it clear that nobody could have seen the votes on the ballots because of the Region 4 Agent's process for counting.

Credible testimony ignored by the Regional Director proved the Employer's point. To this end, RN Supervisor Arlene James described the ballot count, testifying as follows:

> Q: The Board Agent in charge, I assume she counted the ballots or she –
>
> A: Yes, she did.
>
> Q: Tell us how she did that.
>
> A: She stood at the table. She opened the boxes. They were sealed. She showed us that they were sealed. She opened them. She stated that she was going to count the ballots and she would do that out loud. So she pulled them out one at a time. She unfolded them and then she read whether it was yes or no. And she put them face down in a yes or no pile.
>
> Q: Could you see the ballots and how they were marked?
>
> A: No.

Q: Why is that?

A: I don't know. That was how she conducted it. That's how she did it.

(Appx. DD at. 109).

Regina Anthony, Director of Nursing, also testified as to the method by which ballots were counted and indicated that she and the company's observer were instructed to stand approximately 20 feet away from the tables. (Appx. DD at 134). Anthony further described the process as follows:

Q: She took the ballots out.

A: She took the ballots out. She reached into the box, took the ballots out, turned them over onto the table and said yes, if there was a yes ballot, and no, if there was a no ballot, and turned the paper over onto the table.

Q: Did she do anything so that the audience, the people that were standing in the room could see how these ballots were marked?

A: No.

Q: Did she hold them up in any fashion?

A: No. No. They were in and out, from my recollection.

Q: Could you see how many of the ballots were actually marked, either the yes box or the no box?

A: Absolutely not.

(Appx. DD at 136).

Administrator LaSalle testified that the Agent "divided the colors first. Unfolded all of them as she was dividing the colors and had two piles, I think yellow and green colored ballots. She did the LPN vote first. And would hold the ballot in front of her face to see it and then divide it into a yes or no pile." (Appx. DD at 187). When asked if the ballots were shown so that LaSalle could see the markings on them from where she stood, LaSalle testified that they were not; when asked if there was anything that troubled her about the election, LaSalle affirmed that there was,

explaining that she was bothered by the fact that "I couldn't see what was marked and the fact that one of the agents left." (Appx. DD at 189).

Unit Manager Keisha Sample was also present for the count; when asked if she could see the markings on the ballots, she testified "[w]e couldn't see what was on the ballots. She just said yes, placed it face down, yes, placed it face down. No one witnessed the yes or no." (Appx. DD at 326). Even Petitioner's own witness, CNA Lori Hammond, testified that she could not see the markings on the ballot. (Appx. DD at 363).

Still, with respect to the ballot count, the most notable testimony at the Hearing came from Nabie Bangura, LPN Supervisor, who served as the observer for the Employer during the afternoon session. As an observer, Bangura was informed by the Employer of his duties; these, however, turned out to be inconsistent with what the Agent directed: "[t]he lady who was counting, the one that was supposed to count the ballots, the one that was there to count the ballot asked to stay, everybody was at the back […] Everybody stay at the back." (Appx. DD at 287). Bangura testified that this surprised him, because he believed he was supposed to be a counter, as well; when asked about his duties, he testified that he was "supposed to be observe after the counting. That's why I was surprised because after the election, we're supposed to be observing the lady counting, but we are not there." (Appx. DD at 288). Bangura further added that "everybody" was at the back while the Agent counted the ballots, and that nobody could see how the ballots were marked: "[w]e cannot see what she was doing because she would open the card, said yes, no, yes, yes, yes. So I mean nobody can see what was on the paper." (Appx. DD at 288).

When asked if the Agent showed the marked ballots to the crowd, Bangura answered that "she didn't do that;" when asked how he would know if someone had voted yes on their ballot, Bangura responded "I have no idea how we know." (Appx. DD at 289). Finally, when Bangura

was asked if he had been able to verify the accuracy of the count, he rhetorically replied, "How could I be able to verify?" (Appx. DD at 291).

The weight of this testimony, which the Regional Director apparently ignored, or inexplicably chose not to credit, cannot be overcome, and as such, the evidence establishes that the Agents conducting the tally of votes violated:

(1) Board regulation 29 CFR 102. 69(a), by actively prohibiting the employees who had been designated by the Employer as its authorized observers from preforming the observer duty during the vote count;
(2) Board Casehandling Manual sections 11340.5 and 11340.6, by failing to conduct the vote count to assure verification of the fairness of the vote and accuracy of the count by all parties and the public.

Each of these concerns is discussed below.

a. The Actions of the Agent Effectively Disabled the Employer's Observer from Performing Observer Duties.

There is significant legal basis for the rights and duties of an election observer. These originate in the Board's Rules and regulations, at 29 CFR § 102.69 (a), which provide in relevant part:

> "…When the election is conducted manually, any party may be represented by observers of its own selection, subject to any limitations as the regional director may prescribe…"

29 CFR § 102.69(a).

Guided by these same regulations, Region 4 itself published a Notice of Election that specifically addresses the role of "observers." Each Notice described the role of "Authorized Observers" as follows:

> "Each party may designate an equal number of observers, this number to be determined by the NLRB. These observers (a) act as checkers at the voting place and at the counting of ballots […]"

Finally, to fully effectuate the Observer's role, the Board has published Form NLRB-722, "Instructions to Election Observers." The Instructions list the duties of observers, including the duty to "[r]emain in the voting place until all ballots are counted in order to check on the fairness of the count." Conversely, observers are not to "[d]iscuss or argue about the election."

In sum, it is clear that the applicable Board regulation 29 CFR §102.69(a), the Notices of Election specific to these cases, and the Instructions to Observers, entitled each party to have a designated observer in a physical position to act as a safeguard and confirm the tally of ballots. This observer also had the right to not be denied the opportunity to perform his or her duties, and accordingly, not to be actively blocked from performing those duties related to serving as a "checker" of the election's outcome. By her actions, however, the Agent in this case unilaterally eliminated half of the observer's role; in turn, she restricted him in the exercise of his rights under the Act, and compromised the integrity of the election results.

It is clear that forcing everyone, including observers, to stand back from checking table so that they could not see and count the ballot markings was accomplished by the region 4 Agent and constitutes clear error requiring that the election results be set aside. The Regional Director's findings and recommendations contradict the overwhelming preponderance of the evidence. They are contrary to Board regulations, the Notices of Election, and the Board's Instructions to Election Observers, Form NLRB-722. As such, this constitutes an egregious error in the conduct of the election, and accordingly, the Employer's objection should have been sustained.

b. The Region 4 Agent's Vote Count Violated the Safeguards Required by the Casehandling Manual

At its core, the justification for allowing the observers to participate in the tally of ballots is to reassure all parties so that they may have confidence in the fairness and accuracy of the election outcome. More broadly, the purpose of all of the Board's carefully crafted election rules

is to guarantee fairness and the appearance of neutrality. Thus, it follows that the procedures for the counting of ballots are set forth in great detail in the Board's Casehandling Manual for Representation Elections, where one of the main concerns is the ability for observers and party representatives to oversee and, in fact, be part of the vote counting process:

> 11340.2 Persons Present
>
> **The actual participants** in the count are the Board agents **and official observers**, in the number necessary.
>
> Also present may be members of the press and other interested persons to the extent permitted by the physical facilities and the permission of the owner of the premises being used. The Board agent in charge of the election should use his/her discretion in limiting numbers.
>
> (Emphasis added).

At Yeadon, the Board Agent was the only active participant, to the purposeful exclusion of the employees who had been officially designated as observers. Contrary to the Manual, she ordered everyone to step back so far from the checking table that no one could see and count how the ballots were marked – her order blocked the very employee who had been designated as the Employer's observer from performing in that important role.

As described above, an observer, Mr. Bangura's testimony is especially relevant, particularly instructive, and disturbing: he expressed in his testimony that he did not think this was right because no one else could tell if the count was accurate or not. According to Mr. Bangura, the observers were not even in a position to see how the ballots were marked, much less assist in the count or check it. (Appx. DD at 286-89, 291, 299, 301-02).

Turning to the more specific mechanics of the count, the manner in which the tally was conducted was also contrary to the procedures outlined in the Board's Casehandling Manual. There are two ways it is to be done, as follows:

> 11340.5 Informal Method

> The Board agent(s), stationed alone on one side of a counting table, removes the ballots from the box, opens them one by one, calling out **and displaying the preference expressed and places them, face up, in piles according to the preferences expressed.** On the other side of the table are witnesses representing all parties (and behind them are spectators, if any), who watch the proceedings. When the box is empty – parties' representatives should be allowed to inspect it at close range – a Board agent should count aloud the different piles, **displaying each ballot to the witnesses as it is counted**. Ballots should be packaged, according to preference, in groups of 50.
>
> 11340.6 Formal Method
>
> Here again, the Board agents are alone on one side of a table. All but one of them unfolds the ballots, placing them face down; the other Board agent takes each ballot as it comes, **calling out and displaying the preference expressed and placing it, face up**, on the pile representing that choice.
>
> On the representatives' (and spectators') side of the counting table, there should be a tally sheet Form NLRB-741 for the votes received by *each* party. **Seated at each tally sheet should be a representative from *another* party; that representative tallies (*IIII III*) each of the votes received by that party as it is called out. Behind the representative, as a check, is a representative of the party whose votes are being tallied on that sheet**. When a party's tally reaches 50, the calling is temporarily halted while the particular pack of 50 is recounted in view of the representatives and then packaged. The totals subsequently arrived at are checked against the packs. Completed tally sheets Form NLRB-741 are signed by the tallier and the checker.
>
> (Emphasis added).

But the Agent here failed to follow either of these procedures for the counting of ballots, and she failed by a large margin. There is no way the Employer's observers could "witness" the counting or "tally" votes as intended by the Casehandling Manual provisions – they were forced by the Agent to be too far away. They were not in a position to see any vote markings, nor could they "check on the fairness of the count." According to some witnesses, the Agent left the tallies face down on the table, further frustrating any potential transparency. As such, the Employer's observers were in no position to act as a safeguard and could do nothing to reassure the Employer or the voters that the markings accurately reflected voter intent. There was no verified count – none – because the Agent, by her express order, blocked the Employer's observers from

performing their duty of checking the votes. And, once again, there is no explanation as to why the Region refused to follow established practices, or why it chose to deviate from the rules specifically engineered to prevent this type of confusion and suspicion – nor was there any reason for the Agent's failure to conduct her count in a manner that would not "destroy confidence in the election process." *Athbro Precision Engineering Corp*., 166 NLRB 966 (1967). As such, this egregious conduct warranted the election being set aside, and the Employer's Objection should not have been overruled. The Regional Director failed to explain why he credited two of Petitioner's witnesses over all the other witnesses and failed to apply the appropriate standard to the conduct at issue. Applying the appropriate standard, confidence it is clear that confidence in the election process was undermined and that a new election is warranted.

Finally, to the extent that the Regional Director found it "concerning" to the Employer's objection that the observers did not complain about their inability to view the ballots, this is no more than an attempt to shift the blame. The suggestion that the employees designated as observers have some duty to stand up and protest the way that an experienced Agent of the National Labor Relations Board conducts an election, and that a failure to do so waives any future objections, is both troubling and legally wrong. That the Regional Director would even undertake such an extraordinary attempt to blame *the observers* for the Agent's mishandling of the ballots and depriving the Employer's observers from the ability to perform their statutory role is beyond the pale; it is outrageous.

Clearly, any designated observer should be entitled to trust the Region's agents to know and fairly apply the election rules. And indeed, designated observers are under explicit instruction not to discuss or argue about the election. The idea that the Board Agent was in control was apparent in witness testimony; when asked if she – or any of the other witnesses – attempted to get

closer, Administrator LaSalle testified that they had not, because they had already been ordered to stay back. (Appx. DD at 208-209). Observer Bangura's attitude was the same; according to him, the Board Agent was "the one in charge of everybody at that time […] she was the one who supposed to tell go over there, then we stay at the back. She was in charge." (Appx. DD at 301-302). Meanwhile, there was no question that, by her actions, the Agent was purposefully removing individuals from the immediate area, and intentionally not allowing them to see the marked ballots. This was not an accident or a blocked view; this was a conscious effort by the Region 4 Agent to have the observers and others far away from the ballot counting where they would not "bother" her ballot count to herself. As such, an observer cannot be faulted for obeying the Agent's orders, or for choosing not to argue with her about the way that she was conducting her count. Again, the Regional Director's bizarre notion that this is a failure attributable to the observers, and not the trained Agent conducting the election, is deeply troubling, and should not be adopted by the Board. It is grounds for granting this Request for Review.

D. The Regional Director Erred In Not Setting Aside The CNA Case Election Based On The Objection To The Petitioner's Coercive Service Of Void Subpoenas To CNAs

In his Decision and Certification, the Regional Director erred in overruling Employer's Objection 1 to the election in the CNA case, which was based on the Petitioner distributing void and unenforceable Board subpoenas to 33 eligible-voter CNA employees only two days before the unit hearing in that case. (Appx. EE). In doing so, he rejected the Employer's Objection 1 to the CNA case election based on that conduct. His decision was based on four stated bases:

1. That issuance of a subpoena is not per se coercive conduct;
2. That there was nothing in the record "that Petitioner" told employees they could go to jail if they did not comply;

3. That mass issuance of the subpoenas to harass the Employer is not evidence that the Petitioner's actions tended to interfere with employee's free will; and

4. That there was no evidence to support a finding that the Petitioner's replication of Board subpoenas or failure to include witness fees indicated that the Board favored the Petitioner.

He is wrong.

The evidence of the objectionable conduct by the Petitioner and its impact on employees and the employer is uncontroverted. On or around April 26, 2017, employees and agents of Petitioner issued and served on employees 32 unenforceable subpoenas for a hearing to be held two days later. Despite the fact that the Petitioner knowingly failed to serve witness fees and mileage amounts, thus making the subpoenas unenforceable, Petitioner's agents nevertheless informed the subpoenaed employees that the subpoenas were legal, and that employees were required to comply. As a result of this action (and the accompanying comments of the Union's agents), some employees subjectively and reasonably believed noncompliance with the subpoenas risked a warrant of arrest or a trip to jail, and talked about their concerns with others. (Appx. DD at 33. 80, 301-311, 164, 174-175).

To this end, one witness testified, without contradiction, that employees were talking about the fact that failing to honor the subpoenas could mean "a cop coming to their house." (Appx. DD at 301-11). Furthermore, such concerns were echoed by Tolbert, member of the employee organizing committee (and self-professed agent of the Union) who distributed many of the subpoenas, and testified that her "personal opinion" was that if you receive a subpoena and "you don't go you could be prosecuted or fined. That's to my knowledge. It wasn't said to me, but if I'm given a subpoena that's what go through my head, like, oh, if I don't go, I'm going to get locked up." (Appx. DD at 80). Even Michelle Stewart, SEIU Healthcare PA Organizer, testified about the effect the subpoenas had on the witnesses, and their fear of enforcement. In discussing

her interactions with a group of eligible voters at the bus stop after the subpoenas had been served, Stewart herself testified to the fact that the employees were concerned, and that the Petitioner's actions were inexorably linked to the NLRB:

> "When [an eligible voter] came to the bus stop, it was a couple of workers come out to the bus stop and were concerned about the subpoenas they had, whether they were real or not. They were told inside the building that they wasn't real so they wanted to know from me. I said they was real. They came from the Labor Board. I wouldn't give out fake subpoenas."

(Appx. DD at 33).

This, of course, was patently untrue, and the subpoenas were not "real" (or at least, not legally sufficient). Instead, all were invalid on their face because they did not include mileage fees; others contained incorrect names, or even initials. Stewart further admitted that she issued duplicate subpoenas with the same identifying number to multiple potential witnesses, because she "kind of messed up on a few of them." (Appx. DD at 33).

In reality, issuance of a subpoena is itself, *per se*, coercive conduct – obedience is compulsive absent procedural actions to quash or revoke the subpoena. In even further, falsely leading employees to believe that subpoenas are enforceable, and causing employees to fear arrest for noncompliance, is threatening. And here, the abuse of the subpoena process was exceedingly coercive and threatening because it was done with no sound, legal reason or basis.[8] It is a blatant display of power by Petitioner – "jerking" both the employer and employees "left and right" to show it can be done -- and clearly, it was an effective one as the uncontroverted evidence of employee confusion and employer disruption shows. Even worse, however, is the fact that the message to employees was not that the Petitioner was acting alone – again, in reality, the message

[8] Apparently, the Union ultimately decided not to enforce the unenforceable subpoenas, and communicated the same to employees; indeed, in the end, the Union did not subpoena any unit witnesses to testify in that particular hearing. (Appx. Z).

was that the Union was able to use its power to have the NLRB process cause the confusion and disruption.

Simply put, this was a tactic of harassment, and it accomplished two things - employees saw that the Petitioner had the power to cause significant inconvenience and expense for the Employer and employees; and they saw that the Petitioner had obtained that power directly from the NLRB. Not surprisingly, this conduct gave the employees the impression that the Union, in collaboration with the NLRB, had the authority to disrupt the Employer's operations, and potentially take employees to jail.

Contrary to the Regional Director's bald conclusion that subpoenas are not *per se* coercive, the entire point of a subpoena is coercion – it compels a person to obey its order.[9] Here, that subpoena compulsion allows no doubt that serving 32 sham subpoenas two days before a hearing evidences a complete disregard for and misuse of the Board's processes, or that this manipulative tactic could reasonably coerce employees in the exercise of their rights. Nor can the Union argue that this coercion wasn't the express object of its demonstration of strength – clearly, the Union wanted the employees to see this exercise, and the NLRB's tacit approval of its actions. The potential for coercion was not speculative – that this would terrify employees made no difference; that the mass exodus of over half of the Employer's scheduled CNAs with two days' notice could jeopardize the Employer's ability to care for vulnerable patients, potentially constituting a "crisis," was equally ignored. All that mattered to the Petitioner was winning an election, and employees could not have been blind to the Union's willingness to subvert the Board's procedures for its own

[9] The Regional Director erroneously asserted with no evidentiary support that the Employer should have informed the Regional of Region 4 of the subpoena misconduct and requested relief – but the Employer did that. (Appx. X at 1; Appx. Y). Despite an unfair labor practice charge, the Region did nothing, and even refused to block the R Case proceeding. (Appx. Y; Appx. Z at 11-12; Appx. DD at 174).

gain, without any remedy to the Employer, or any punishment from the NLRB. But this is not permissible, and under these circumstances, an election cannot be fair.

The Board takes its neutrality very seriously. As described in *Goffstown Truck Center, 356* NLRB No. 33 (2010), the Board will categorically invalidate an election whenever a party purports to speak with the "false cloak of Board authority," or where the facts suggest that the Board favors one party in the election over the other. *See also, Glacier Packing Co.*, 210 NLRB 571 (1974)(setting aside an election when a Board agent's conduct suggested preference for the union). As such, the Board carefully scrutinizes conduct that impinges on that neutrality, and will overturn an election where it has been compromised. *Monmouth Medical Center v NLRB*, 604 F2d 820 (3rd Cir, 1979).

It is unimaginable that employees receiving 32 NLRB subpoenas on official NLRB forms less than 72 hours before a scheduled hearing in front of a NLRB Hearing Officer would *not* reasonably conclude that the Petitioner was allied with the Board in the effort to compel employees to appear en masse to testify for the Union – even at great cost to the Employer, and potential risk to those in the Employer's care. Under these circumstances, the only logical conclusion from an employee-served point of view reasonably was that the Petitioner enjoyed the full blessing of the NLRB to coerce employees to testify, and that the Employer was helpless to defend against the overt the harassment its operations in the coordinated subpoena assault. This impression served to destroy laboratory conditions at Yeadon, and rendered a fair election impossible. Accordingly, given the undisputed facts here, the Board should grant the Request for Review of the Regional Director's finding that Objection 1 in the CNA case should be overruled.

E. The Regional Director Erred In Certifying Petitioner As Representative Of Two Bargaining Units That Were Approved Based On The Regional Director's Application Of the Board's Overruled *Specialty Healthcare* Decision

In Section a. – Exception to Appropriateness of Bargaining Units, at pages 19 to 21 of the D & C, the Regional Director erred (1) in adopting an erroneous finding of the Acting Regional Director that the Employer had abandoned its unit appropriateness argument related to *Specialty Healthcare & Rehabilitation Center of Mobile*, 357 NLRB 934 (2011), *enf'd*, 727 F.3d 552 (6th Cir. 2013) in the LPN case, and (2) by wholly misconstruing the Employer's argument in the CNA case and finding that application of the *PCC Structurals, Inc.,* 365 NLRB No. 160 (2017), rule there would have caused no change in the results of the election. The Regional Director's action is a vivid example of how the R Case Regulations, as applied, prejudiced the Employer here and violated its right to due process.

In the LPN case, *Specialty Healthcare* was the law of the land at the time of the unit hearing. To preserve its position that the petitioned-for unit was inappropriate, the Employer in its Statements of Position expressly objected to the petitioned-for unit that *Specialty Healthcare* allowed. The Employer stated as an objection in Attachment A, Section I. B. "The petitioned-for unit will create a proliferation of units in violation of Board policy and the Act, as amended in 1974 to deal with the special nature of the healthcare industry." (Appx. B). At no point did the Employer waive that objection. Moreover, introduction on evidence on the point would have been irrelevant and inadmissible given that the Hearing Officer, as confirmed by the Regional Director, was applying *Specialty Healthcare* despite the proliferation of units. To make sure there was no mistake as to the Employer not abandoning or waiving any of the objections to the unit proceeding, on the very first page of its Post-Hearing Brief, the Employer stated as follows: "While there are other issues raised in the Employer's statement of position, without waiving those other issues,

this brief is limited solely to the issue of whether the LPNs are properly considered supervisors." (Appx. V at 1). This reservation preserved the objection while at the same time not wasting argument on a then futile position that Region 4 then would not accept, that *Specialty Healthcare* was bad law. The Regional Director carried the same error on.

With respect to the CNA case, the Regional Director makes a series of unfounded assumptions about what the Employer's position on an appropriate unit would have been and how the election would have been effected had *Specialty Healthcare* not been the law. He wrongly concludes only 9 voters were in question, and they would not have made a difference in the election. This, too, is all wrong.

In the CNA case Statement of Position, the Employer again objected on the grounds that the petitioned-for unit was inappropriate because it would cause a proliferation of units. The Hearing Officer in that case refused to consider the issue and allow evidence on it and instead said the issue was being transferred to the Regional Director. (Appx. X; Appx. Z at 7-8). Thus, the Employer was foreclosed from making any argument as to what the appropriate unit would be if *Specialty Healthcare* had not been the rule, much less introduce evidence to support the argument that the Region and the Hearing Officer considered irrelevant, given the *Specialty Healthcare* rule. Even still, however, the Employer's counsel stated on the record that all the arguments in the Statement of Position were preserved, even though the Hearing Officer was not permitting evidence on that issue. (Appx. Z at 7-8).

And finally, the Regional Director had no evidence as to how the Employer would have addressed the issues raised in either petition if *PCC Structurals* rule had been in place. For him to assume that the CNA case unit would stay the same and that only 9 employee votes would have

been in question, thereby not changing the result, was plain error warranting the grant of this request for review.

To its credit, the Board's Office of General Counsel issued a memorandum to deal with exactly this type of case situation – yet the Regional Director failed to comply with the memorandum. (Appx. FF). The Regional Director should have allowed the Employer to show cause why the units were now inappropriate under *PCC Structurals*, and it arbitrarily did not. But instead of conceding his error and allowing the Employer to take the actions set forth in the memorandum, the Regional Director decided to forgive his own mistake, and conclude that it did no harm to the Employer's rights. (Appx. EE at 19-21).

In sum, the Employer contends that the Regional Director's certification of the Petitioner as a result of each election is erroneous, because each recommendation was based on bargaining unit determinations which relied upon the Board's now overruled *Specialty Healthcare* standard. In its Statements of Position for each of the combined cases, the Employer expressly included its objections to the petitioned-for units on the grounds that they were each inappropriate due to the exact problem created by *Specialty Healthcare* – proliferation of units in the healthcare industry and beyond. (Appx. B; Appx. X). In the LPN case, the Employer repeated its non-abandonment of the unit appropriateness issue in its post-hearing brief, stating that the other arguments in the Statement of Position were not waived and were still the Employer's position. (Appx. V at 1; Appx. X at 7-8). In the CNA case, the Employer stated on the record that all the arguments in the Statement of Position were not waived. The Regional Director's action deprived the Employer of the opportunity to show cause why the unit determinations in each case should be reopened for a hearing applying the appropriate community of interest standard of *PCC Structurals*, to argue and

introduce evidence to show that the LPNs and CNAs should be a single unit, if the LPNs are not in fact Section 2(11) supervisors. (*See* Appx. FF).

The Employer submits that when *Specialty Healthcare* was overruled, either Region 4 or Region 22 should have *sua sponte* set aside the election results and ordered the cases back for new hearings on the unit issues based on the objections the Employer raised in each of its Statements of Position. The Employer further submits that new hearings are required here, because of the error now inherent in the Regional Director's unit certifications, which are grounded in, and tainted by, the vestiges of the now-overruled *Specialty Healthcare* decision. For this reason as well, the Board should grant the Request for Review.

III. CONCLUSION

The errors discussed above are prejudicial and constitute compelling reasons for review and reversal of the Acting Regional Director's two D & Ds and the Regional Director's D & C. In the alternative, to the extent the any of the actions alleged to be error are consistent with prior Board precedent, a compelling reason exists to reconsider such precedent. For the foregoing reasons, the Request for Review should be granted.

Submitted this 4th December, 2018.

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

MANOR CARE OF YEADON PA, LLC,	)	
	)	
Employer,	)	
	)	
	)	
and	)	**Case Nos. 04-RC-196504**
	)	**04-RC-197201**
	)	
	)	
SEIU HEALTHCARE PENNSYLVANIA,	)	
	)	
Petitioner.	)	
	)	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing request for Review has been filed with the Board and served on Regions 4 and 22 of the Board by the NLRB's official E-File system and by regular e-mail to Petitioner's Counsel at the following email address:

Steven Grubbs, Esq. -- steven.grubbs@seiuhcpa.org

This 4th of December, 2018.

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